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Supreme Court of the United States

October Term, 1941

ALBERT MILLER, MAX MILLER and ISIDORE SCARBNICK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT THEREOF

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vs.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, The Supreme Court of the United States:

Your petitioners, Albert Miller, Max Miller and Isidore Scarbnick, respectfully show:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

These three petitioners were jointly indicted on October 14, 1938 (R. 1) with the Alaska Smoked Fish Company, a corporation, and two others, in the United States District Court for the Eastern District of Michigan. They were later tried before a jury, convicted (R. 74) and sentenced on May 29, 1940 (R. 75-77). The conviction

was affirmed by the Sixth Circuit on February 5, 1942 (R. 121) and rehearing was denied March 10, 1942 (R. 129).

The only question involved is the sufficiency of the indictment to charge an offense.

The indictment contains two counts: One, for conspiracy under Section 88, Title 18, U. S. Code to violate Section 29 of the Bankruptcy Act as amended (11 U. S. Code, Section 52b) by concealing assets from a receiver in bankruptcy, and two, the substantive offense of concealing the same assets from the receiver.

Objection was made to the sufficiency of the indictment by motion to quash (R. 7) which was denied by the court (R. 13). The objection was renewed in a motion for directed verdict and dismissal (R. 10-11; 14) which was denied and exception allowed (R. 11).

The District Court did, however, order the United States to elect under which section and subsection of the statute it would proceed for the substantive offense, whereupon the United States elected to proceed under subsection 1 (R. 10) providing:

> "A person shall be punished * * * upon conviction of the offense of having knowingly and fraudulently concealed from the receiver, trustee, United States marshal or other officers of the court charged with the custody of property * * * any property belonging to the estate of a bankrupt."

The facts are revealed in the indictment itself and may be summarized thus:

The Alaska Smoked Fish Company, a corporation, was organized under the laws of Michigan in 1934. It was engaged in the business of smoking fish and selling it to retailers in Detroit and also in the business of wholesaling and retailing groceries (R. 3).

The corporation maintained a warehouse, smoke house and main office on Napoleon Street, a retail store on Twelfth Street and another on Dexter Boulevard. (R. 3).

The petitioner, Max Miller, was President, the petitioner, Isidore Scarbnick, was Treasurer of the corporation which (it is charged) they dominated (R. 3) and the petitioner, Albert Miller, was in charge of the two retail stores of the corporation (R. 3).

On February 7, 1938, Albert Miller (it is charged) rented a vacant store on Fernwood Avenue under the name of Edward C. Jacobs and then the three alleged conspirators, shortly after February 7, 1938, transferred from the Napoleon Street, Twelfth Street and Dexter Boulevard stores to the Fernwood Avenue store (R. 3) 830 cases of groceries, 290 cans of sardines, 12 pounds of tea and 36 cans of mushrooms (R. 2, 6) which they "concealed" there until April 29, 1938 when the property was "discovered" and turned over to a receiver in bankruptcy. (R. 4).

It is now most important to note that the indictment does not merely charge the crime in the language of the statute, but it sets forth affirmatively that there was no bankruptcy pending when the property was transferred and "concealed" because an involuntary petition was filed against the corporation alone on April 15, 1938 (R. 5). Three days later, on April 18, 1938, the very same day that the alleged concealment in the substantive count is charged to have taken place (R. 6), a receiver was appointed (R. 2, 5).

The indictment further states affirmatively that the corporation was *not* adjudicated a bankrupt until May 2, 1938 (R. 5), three days *after* the receiver took possession of the property. (R. 4).

The indictment does not allege, but the court will, of course, judicially notice that the bankrupt corporation's schedules disclosing its assets were not due until May 12, 1938 under Section 25, Title 11, which provided at that time as follows:

> "The bankrupt shall * * * (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail * * *."

In addition to disclosing its property in the schedules, the bankruptcy law further provided that one of the bankrupt's duties was to submit to an examination concerning its property at the first meeting of creditors and at such other times as the court shall order:

> "The bankrupt shall * * * (9) when present at the first meeting of his creditors, *and at such other times as the court shall order,* submit to an examination concerning * * * the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

The first meeting of the creditors referred to in the above statute, however, could not possibly be held until at least ten days after the adjudication, under the provisions of Section 91, Title 11, U. S. C. which provides:

> "The court shall cause the first meeting of the creditors of a bankrupt to be held not less than ten nor more than thirty days after the adjudication * * *"

The indictment does not charge that the court had ordered the bankrupt to submit to any examination concerning his property at any other time.

It is vitally important to note, therefore, that the indictment upon its face shows that at the time of the alleged concealment on April 18, 1938, in the substantive count, (R. 6) and on April 29, 1938, the date when the receiver took the property into his possession under the conspiracy count, (R. 4) the statutory period—May 12, 1938—for disclosure of assets by the bankrupt had not yet elapsed, nor had this statutory period been shortened by any order of court, nor had there been any demand for an earlier disclosure by the court, the receiver or otherwise.

II. THE QUESTION PRESENTED.

Upon this state of facts, the fundamental question presented is simple:

Does the indictment charge the offense of "concealment" of assets from a receiver in bankruptcy when the indictment affirmatively shows that the statutory time allowed to the officers of a bankrupt corporation within which to disclose its assets, had not yet elapsed, and there is no charge that the statutory period was shortened by court order, official demand or otherwise?

The same problem, differently stated, is:

Does concealment of assets prior to bankruptcy become criminal instantly on bankruptcy intervening, or the appointment of a receiver, or do the bankrupt and its officers have the legal right to wait until the schedules are due, to disclose assets, unless the Court has ordered an earlier disclosure?

The construction taken by the courts below in the case at bar was to the effect that if there were concealment prior to bankruptcy, then instantly the crime was complete when bankruptcy occurred or a receiver was appointed, whereas reason and the expressions of other federal courts are to the effect that mere concealment prior to bankruptcy is insufficient and after bankruptcy and the appointment of a trustee the bankrupt has ten days after adjudication in which to disclose, and it is not a crime to fail to disclose before this period has elapsed, where the Court has not ordered any earlier disclosure.

III. BASIS OF JURISDICTION.

This case involves the interpretation and definition of the word "concealment" in Section 29b of the Bankruptcy Act (11 U. S. C. Section 52b quoted at page 11 hereof) and this court has discretionary power to order certiorari to the United States Circuit Court of Appeals for the Sixth Circuit under Section 347, Title 28, U. S. C. which provides in part:

> "In any case, civil or criminal, in a circuit Court of Appeals * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto * * * to require by certiorari, that the case be certified to the Supreme Court for determination."

Under Rule XI of this Court pertaining to criminal appeals the petition must be filed within thirty days of the decree of the Court of Appeals and in this case the order of the Court of Appeals denying rehearing was entered March 10, 1942.

There was no opinion by the District Court, other than its views of the law as given in the charge to the jury,

later referred to. The opinion of the Circuit Court of Appeals is set out in full at page 122 of the Record, and is reported as *Miller* v. *U. S.*, 125 F. (2nd) 517.

IV. REASONS FOR ALLOWANCE OF WRIT.

1. This case presents an important question of federal law which has not been, but should be, settled by this Court in that it presents a question as to the meaning of the word "concealment" under Section 29b of the Bankruptcy Act (11 U. S. C. Section 52b), which has often been touched upon in the opinions of lower federal courts, without unanimity of definition, but has never been construed by this Court.

2. The criminal offense of concealment in violation of the bankruptcy law is susceptible of two meanings. That adopted by the courts below to uphold the conviction in this case, and one which has seeming support in some of the decisions of the lower federal courts, indicates that the crime of concealment may consist of the secretion, hiding, etc., of assets, as for example, from a wife, the public generally, or otherwise, prior to bankruptcy and then when bankruptcy intervenes and a receiver or trustee is appointed instanter there is a violation because there was a concealment, continuing after bankruptcy.

On the other hand, there is the view that even though there is concealment by secretion, hiding or otherwise, prior to bankruptcy, as from a wife, the public or what not, mere intervention of bankruptcy is not sufficient to constitute the crime of concealment, but there must be the additional element of a failure to disclose within the time allowed by law after bankruptcy. If the true view is that adopted by the courts below the list of otherwise law-abiding citizens who are potential criminals is greatly

enlarged. Many a man keeps a safe deposit box, automobile, real estate and other property in his wife's name. Many a person has several bank acounts, real or personal property, information regarding which he does not broadcast and all of which may be technically "concealed" or hidden.

If bankruptcy intervenes or a receiver is appointed do all these persons instantly become criminals? Rather, is not the true rule that mere concealment prior to bankruptcy, plus an intervening bankruptcy and the appointment of a receiver, still does not make the crime of concealment complete, because the bankrupt is allowed a certain time in which to collect his affairs and to make disclosures. There must be, consequently, a failure to disclose or reveal the concealed property within the time allowed by law—namely, by the time the schedules are due, or the first meeting of creditors, unless this period has been shortened by an order of court or some official demand by the court or its representative?

The reasons for the issuance of the writ are more fully analyzed and discussed in the brief annexed hereto and we, therefore, do not repeat at this point.

V. PRAYER FOR WRIT.

WHEREFORE, your petitioners jointly and severally pray that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding said court to certify and send to this Court a full and complete transcript of the record and proceeding of said court in cause number 8682 on its docket, wherein petitioners are appellants and the United States of America is appellee to the end that said cause may be reviewed and deter-

mined by this court and that the judgment of said Circuit Court of Appeals be reversed and for such other relief as this court may deem proper.

ALBERT MILLER,
MAX MILLER,
ISIDORE SCARBNICK,
Petitioners.

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